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COMMENTS

MISTAKEN IDENTIFICATIONS CAUSE WRONGFUL CONVICTIONS: NEW JERSEY'S LINEUP GUIDELINES RESTORE HOPE, BUT ARE THEY ENOUGH?

Dori Lynn Yob*

I. INTRODUCTION

Pause for a moment and consider the story of one of the many people who have been wrongfully convicted of a crime that they did not commit.¹ In 1984, a man broke into a young college student's apartment, held a knife to her throat, and raped her.² Shortly thereafter, she went to the police station and identified the man who she believed was her assailant, through the use of a photo lineup.³ She later picked the same man out of a live lineup and identified him as her attacker at his criminal trial in 1985.⁴ She stated that she was "absolutely, positively, without-a-doubt certain he was the man who raped [her] when [she] got on that witness stand and testified against him."⁵ She was wrong. Nine years later, a DNA test proved that the man was innocent.⁶ During her testimony at the trial of the man that she believed was her attacker, she was presented with a picture of the man who turned out to be her actual attacker and she swore that she had never seen him.⁷

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1. The story used in the introduction is the true story of Ronald Cotton. See Mark Hansen, *Scoping out Eyewitness IDs*, A.B.A. J., April 2001, at 39.

2. See *id.*

3. See *id.*

4. See *id.*

5. *Id.*

6. See Hansen, *supra* note 1, at 39.

7. See *id.* Cotton was granted a new trial where evidence was presented that a man

The criminal justice system is replete with stories of wrongful convictions, similar to the one above. In 1992, Barry Scheck and Peter Neufeld founded The Innocence Project at Benjamin Cardozo School of Law in New York to assist individuals who have been wrongful convicted.⁸ The New York Innocence Project announced that as of January 19, 2002, supervised law students have assisted in cases that have led to 100 exonerations.⁹ Mistaken eyewitness identifications were a major cause in sixty of the first eighty-two DNA exonerations handled by the Innocence Project in New York.¹⁰

The Northern California Innocence Project located at Santa Clara University School of Law is part of the National Innocence Network. Kathleen Ridolfi, Director of the Northern California Innocence Project says, "what is important about Innocence Project cases is not whether DNA was tested, but what innocence cases are telling us about problems within our criminal justice system."¹¹ These exonerations have led to a growing awareness that there is a real risk in the criminal justice system that innocent people will be convicted and sentenced.

How could the eyewitness in this story, and others like her, be so sure, yet so wrong? Studies have shown that eyewitness identification evidence is one of the least reliable forms of evidence. Yet, it is among the most persuasive to juries.¹² It is difficult for sympathetic juries not to put significant weight on concrete identifications by victims like the one above. Jurors are not alone; studies show that judges, attorneys, and laymen alike believe that eyewitness identifications are a reliable

had told other prisoners that "he had committed the rape for which Cotton had been convicted". *Id.* The man took the stand and denied his involvement in the rape. It was at this time that Thompson testified that she had never seen this man before, although he proved to be the actual perpetrator. *Id.*

8. See *Innocence Project Website*, available at <http://www.innocenceproject.org> (last visited January 19, 2002). The Innocence Project is located in New York at Benjamin N. Cardozo School of Law. Barry Scheck and Peter Neufeld created the project in 1992. Since its inception in 1992, twenty-eight states have developed similar projects. The Innocence Project in New York exclusively handles cases in which biological evidence still exists that can be subjected to DNA testing and can prove actual innocence. *Id.*

9. See *id.*

10. See *id.*

11. Dori Yob, *SCU Innocence Project Gets First Exoneration*, THE ADVOCATE, February 2002, at 1.

12. See Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 620 (1998).

form of evidence.¹³ This mistaken belief is troubling for one important reason—errors in eyewitness identifications have proven to be the leading cause of wrongful convictions in Great Britain and North America.¹⁴

Despite troubling statistics from DNA exonerations, eyewitnesses continue to play a vital role in the criminal justice system. Eyewitness evidence is often instrumental in “identifying, charging, and ultimately convicting suspected criminals.”¹⁵ Thus, it is essential that eyewitness evidence be as “accurate and reliable” as possible.¹⁶ The official scientific review paper on recommendations for lineups and photospreads written by the American Psychology-Law Society (APLS), “conservatively estimated” that in the United States, 77,000 suspects per year become defendants based on eyewitness identification evidence.¹⁷

Psychologists have been studying problems with eyewitness identification for over a century, but until recently, their research has been to no avail.¹⁸ Law enforcement officials are now beginning to take steps that will help bridge the gap between social science research and actual law enforcement practice.¹⁹ Most notably, New Jersey recently became the first state to implement the changes in police lineup procedures that psychology researchers have long

13. See Jennifer Davenport et al., *Eyewitness Identification Evidence: Evaluating Commonsense Evaluations*, 3 PSYCHOL. PUB. POL’Y & L. 338 (1997) (examining the role of commonsense knowledge in attorney, judge, and juror evaluations of eyewitness identification evidence).

14. See Steven M. Smith, *Postdictors of Eyewitness Errors: Can False Identifications be Diagnosed in the Cross-Race Situation?*, 7 PSYCHOL. PUB. POL’Y & L. 153, 153 (2001).

15. United States Department of Justice Office of Research Programs, *Eyewitness Evidence: A Guide for Law Enforcement*, at iii (Oct. 1999) [hereinafter *Guide*], available at <http://www.ojp.usdoj.gov> or <http://www.ojp.doj.gov/nij> (last visited Jan. 19, 2002).

16. See *id.*

17. Wells et al., *supra* note 12, at 609.

18. “Professor Borchard’s 1932 text, *Convicting the Innocent*, studied sixty-five cases of wrongful conviction. Wrote Borchard: ‘Perhaps the major source of these tragic errors is an identification of the accused by the victim of a crime of violence. This mistake was practically alone responsible for twenty-nine of these [sixty-five] convictions’” BARRY SCHECK ET AL., ACTUAL INNOCENCE 95 (Signet 2001) (2000).

19. The Department of Justice released *Eyewitness Evidence: A Guide for Law Enforcement* in 1999, and in 2001 New Jersey became the first state in the nation to officially adopt some of the recommendations from the Department of Justice guide. See *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 18, 2001) (Memorandum from John J. Farmer, Attorney General of the state of New Jersey to all county prosecutors, police chiefs, and law enforcement chief executives) [hereinafter *Memo*] available at <http://www.state.nj.us/lps/djc/guides.htm> (last visited Jan. 19, 2001).

recommended.²⁰ On April 18, 2001, New Jersey Attorney General, John J. Farmer, outlined New Jersey's new lineup procedures in a memo to every law enforcement agency and county prosecutor in the state.²¹ The new lineup procedures "took effect" on October 15, 2001.²²

This comment calls attention to potential sources of error in eyewitness evidence,²³ outlines New Jersey's statewide response to those problems,²⁴ and argues against a state-by-state response, proposing the adoption of uniform national guidelines.²⁵ Part II provides a brief synopsis of the problems with eyewitness evidence that have been identified by over twenty years of social science research and the recommendations that have resulted.²⁶ Part II then describes the Supreme Court's response to these problems²⁷ and traces the history of the recommendation for guidelines.²⁸ Part II also describes the guidelines recently adopted by New Jersey.²⁹

Part III briefly identifies the problems with incorporating guidelines through a state-by-state approach.³⁰ Part IV analyses New Jersey's guidelines in light of social science findings.³¹ Finally, Part V presents a proposal for the adoption of compulsory Miranda-like national guidelines and suggests a mechanism for education regarding the problems with eyewitness identification evidence.³²

II. BACKGROUND

The unreliable nature of eyewitness identification evidence is partially explained by the intricate process that occurs within the human mind.³³ In their book *Actual Innocence*, authors Scheck, Neufeld, and Dwyer suggest, "what happens in front of the eyes is transformed inside the head, and is refined, revisited, restored, and

20. See *Attorney General Guidelines for Preparing and Conducting Photo and Live Lineup Identification Procedures* (April 18, 2001) [hereinafter *Guidelines*] available at <http://www.state.nj.us/lps/djc/guides.htm> (last visited Jan. 19, 2002).

21. See *id.*

22. Mark Hansen, *Second Look at the Lineup: New Jersey Hopes to Net Fewer False Identifications*, A.B.A. J., December 2001, at 20.

23. See discussion *infra* Part II.B.

24. See discussion *infra* Part II.E.

25. See discussion *infra* Part V.

26. See discussion *infra* Part II.B.

27. See discussion *infra* Part II.C.

28. See discussion *infra* Part II.D.

29. See discussion *infra* Part II.E.

30. See discussion *infra* Part III.

31. See discussion *infra* Part IV.

32. See discussion *infra* Part V.

33. See *id.*

embellished in a process as perpetual as life itself.”³⁴ This “process” is influenced by many external factors, many of which are controllable by the criminal justice system.³⁵

A. *The Human Mind*

1. *Relative versus Absolute Judgment*

Experiments have shown that eyewitnesses are fairly accurate when the actual perpetrator is present in the lineup, but have difficulty not selecting someone when the actual perpetrator is not present in the lineup presented.³⁶ Research in the area of eyewitness identification has focused on trying to explain this disparity.³⁷ Researchers have found that to understand the reason for this problem one must first understand that lineup identification is governed by a mental process called “relative judgment.”³⁸

Relative judgment theory explains that when presented with a group of suspects all at once, known as a simultaneous lineup, eyewitnesses tend to identify the person who looks most like the perpetrator relative to the other individuals in the lineup.³⁹ At first glance, relative judgment appears to be an acceptable way for an eyewitness to make an identification.⁴⁰ The actual perpetrator should be the one who, relative to the others, resembles the eyewitness’ memory of the culprit.⁴¹ The problem with this process is that eyewitnesses select the person who looks most like the perpetrator regardless of whether the actual perpetrator is in the lineup.⁴² An eyewitness verbalizing his or her decision-making process while relying upon relative judgment would say something like, “I know it can’t be numbers 1, 2, 4, 5, or 6, so it must be number 3.”⁴³ This decision-making process is particularly troubling considering the only crime committed by the person in position 3 may be that he or she

34. SCHECK ET AL., *supra* note 18, at 55.

35. See Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL’Y & L. 765, 765-66 (1995). “In the eyewitness identification research literature, variables that can be controlled by the justice system and that can influence the accuracy of eyewitnesses are called system variables.” *Id.* at 766.

36. See *id.* at 769.

37. See *id.*

38. *Id.* at 613.

39. See *id.*

40. See Wells & Seelau, *supra* note 35, at 768.

41. See *id.*

42. See *id.* at 769.

43. Wells et al., *supra* note 12, at 615.

looks more like the actual perpetrator than the other members of the lineup.

The more desirable method, absolute judgment, is the process by which an eyewitness compares each lineup member to his or her memory of the perpetrator and decides one at a time whether each person in the lineup is the actual perpetrator.⁴⁴ The eyewitness using this process is likely to say something like, "the face just popped out at me."⁴⁵ When an eyewitness uses absolute judgment, he does not compare the members of the lineup with one another, rather he compares each member of the lineup with his own memory of the perpetrator.⁴⁶ Researchers have focused on the importance of formulating procedures that will prompt eyewitnesses to use absolute instead of relative judgment.⁴⁷

2. Contamination of Memory

In order to understand the problems with eyewitness evidence, one must have a basic understanding of how the human mind remembers a face, as well as the factors that influence memory.⁴⁸ An eyewitness' ability to accurately identify another person depends on the eyewitness' ability to perceive, remember, and articulate a particular person or event.⁴⁹

Perhaps more important than understanding how human memory operates is understanding how memory does not operate. "Human memory does not operate like a camera, gathering every detail for later recall exactly the way it was perceived."⁵⁰ Rather, memory involves a process whereby images are altered or reconstructed based on an individual's experiences, biases, and expectations.⁵¹ In order to reconstruct an event, people unknowingly integrate details that occurred after the event to fill gaps or replace forgotten information from that event, "with imagination frequently playing a significant role."⁵² The combination of perception and memory may cause

44. See *id.* at 614.

45. *Id.* at 615.

46. See *id.* at 614.

47. See Wells & Seelau, *supra* note 35, at 768-69.

48. See Fredrick E. Chemay, *Unreliable Eyewitness Evidence: The Expert Psychologist and the Defense in Criminal Cases*, 45 LA. L. REV. 721 (1985) (discussing the need for expert testimony because the process of perception, memory and recall are subject to contamination, which affect the reliability of eyewitness identifications).

49. See *id.*

50. *Id.* at 724.

51. See *id.*

52. *Id.*

distorted or incorrect recall of an event or identification of a person.⁵³

Furthermore, recollection of a face depends on the features of a particular face, and some are more easily recalled than others, with race,⁵⁴ “uniqueness, and attractiveness playing a role.”⁵⁵ A further contributor to mistaken identification is the tendency to confuse a person seen in one situation with a person seen in a different situation.⁵⁶ This is often referred to as “unconscious transference.”⁵⁷ Unconscious transference often results in mistaken eyewitness identification and is difficult to detect.⁵⁸

As these studies indicate, human memory is susceptible to contamination by a number of internal and external factors. This does not mean, however, that eyewitness identification evidence is entirely unreliable.⁵⁹ Rather, it means that such evidence is susceptible to contamination even by those within the criminal justice system.⁶⁰ Variables that have the ability to influence the accuracy of eyewitness identification, but are controllable by the criminal justice system itself, have been termed “system variables.”⁶¹ The methods utilized by the system to obtain identifications must therefore be designed to limit or eradicate the likelihood of contamination.⁶² This is a task that can be accomplished by identifying and controlling such “system variables” and reducing reliance upon relative judgment.⁶³

B. *Controlling System Variables and Reducing Relative Judgment*

Various experiments have been conducted to demonstrate how the relative judgment process operates to cause false identifications.⁶⁴ These experiments have helped researchers identify system variables that can be controlled, resulting in procedures that will help decrease the number of false identifications in the criminal justice system.⁶⁵ The

53. See *id.*

54. See Siegfried L. Sporer, *The Cross-Race Effect: Beyond Recognition of Faces in the Laboratory*, 7 PSYCHOL. PUB. POL’Y & L. 170 (2001) (discussing the differences in accuracy rates for recognizing faces of one’s own ethnic group versus recognizing faces in an ethnic group different from one’s own).

55. Chemay, *supra* note 48, at 729.

56. See *id.*

57. *Id.*

58. See *id.*

59. See Wells & Seelau, *supra* note 35, at 766.

60. See *id.*

61. *Id.*

62. See *id.*

63. See *id.*

64. See *id.* at 769.

65. See Wells & Seelau, *supra* note 35, at 768.

next five subsections outline the recommendations that have resulted from the study of: (1) the effect of instructing the eyewitness that the actual culprit may not be in the lineup,⁶⁶ (2) the effect of manipulating the similarity of lineup participants,⁶⁷ (3) police behaviors and their effects on eyewitness confidence,⁶⁸ (4) patterns of eyewitness responses using the dual lineup procedure;⁶⁹ and (5) the accuracy of eyewitness identification using the sequential presentation procedure.⁷⁰

1. *Instructing the Eyewitness That the Culprit "May Or May Not Be Present"*

An "instruction-biased lineup" is one in which the eyewitness is not explicitly told that the culprit may not be in the lineup.⁷¹ Researchers have suggested that instructing an eyewitness that the actual perpetrator may not be present in a lineup should encourage the eyewitness not to merely make a relative judgment.⁷² In one study, eyewitnesses were not given an instruction that the actual perpetrator might not be present in the lineup.⁷³ Not giving the instruction resulted in 78% of the eyewitnesses attempting to make an identification in a culprit-absent lineup.⁷⁴ When the instruction was given, only 33% of the eyewitnesses attempted identification in a culprit-absent lineup.⁷⁵ This may cause concern that the eyewitness will be less willing to identify someone in a culprit-present lineup.⁷⁶ However, in the same study, when eyewitnesses were given the instruction, 87% identified the culprit when he was in the lineup.⁷⁷ This study demonstrates that

66. See Wells et al., *supra* note 12, at 615.

67. See *id.* at 615-16.

68. See *id.* at 624-27.

69. See *id.* at 616.

70. See *id.* at 616-17.

71. See Donald P. Judges, *Two Cheers for the Department of Justice's Eyewitness Evidence: A Guide for Law Enforcement*, 53 ARK. L. REV. 231, 257 (2000).

72. See Wells & Seelau, *supra* note 35, at 769.

73. See *id.* at 769 citing R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482-89 (1981).

74. See *id.* It is important to note the difference between a culprit-absent lineup and a blank lineup. A culprit-absent lineup is one in which the actual culprit is not present. A blank lineup in the other hand is a lineup in which every person in the lineup is known to be innocent of the offense charged. The result of an identification in a blank lineup is that no charges are filed. The identification in a culprit-absent lineup may result in false identification and charges implicating an innocent person. See Wells & Seelau, *supra* note 35, at 770.

75. See Wells & Seelau, *supra* note 35, at 769, citing R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482-89 (1981).

76. See Wells & Seelau, *supra* note 35, at 769.

77. See *id.*, citing R.S. Malpass & P.G. Devine, *Eyewitness Identification: Lineup*

the “may not be present” instruction does not merely reduce eyewitness willingness to identify someone, rather it helps reduce the use of relative judgment.⁷⁸

Instruction bias is considered a “system variable” because it can be controlled by the criminal justice system.⁷⁹ Simply requiring lineup administrators to give eyewitnesses the “may or may not be present” instruction reduces the rate of incorrect identifications in culprit-absent lineups without reducing accurate identifications in culprit present lineups.⁸⁰ Not giving the instruction, however, may imply to eyewitnesses that the culprit is in the lineup and their task is to merely identify that person.⁸¹ Giving this instruction may help reduce the use of relative judgment by legitimizing the option of not identifying anyone.⁸²

2. Structure of the Lineup

Distracters, foils, and fillers are common terms for individuals in a lineup who are known to be innocent of the offense in question.⁸³ If distractors are chosen in a way that makes the suspect “unduly stand out,” the lineup is said to be “foil biased.”⁸⁴ A false identification occurs when an eyewitness chooses an innocent suspect out of a lineup, and does not occur when an eyewitness mistakenly chooses a foil.⁸⁵

Instructions and the Absence of the Offender, 66 J. APPLIED PSYCHOL. 482-89 (1981).

78. See Wells & Seelau, *supra* note 35, at 769.

79. See Judges, *supra* note 71, at 243-44.

80. See Wells et al., *supra* note 12, at 629.

81. See *id.* at 630.

82. See Wells & Seelau, *supra* note 35, at 778. Removal without replacement experiments demonstrate that such instructions alone are far from sufficient to eliminate relative judgments entirely. In a removal without replacement study reported by Gary Wells in 1993, eyewitnesses to a staged crime were shown one of two photospreads. In one photospread, the culprit was present, in the other the culprit was removed and not replaced with another photo. All eyewitnesses were given the instruction that the actual culprit may not be present. When the culprit was present 54% selected the culprit and 21% said he was “not there” with the remainder choosing distractors. If they were making absolute judgments, the removal of the culprit should have made the 54% who identified the culprit recognize his absence. However, removal of the culprit raised the “not there” response to 32%. The remaining eyewitnesses selected someone else when the culprit was removed. This demonstrates that even with the instructions that the actual culprit may not be there, eyewitnesses make relative judgments. *Id.* at 770, citing Gary Wells, *What Do We Know About Eyewitness Identification?*, 48 AM. PSYCHOL. 553-71 (1993).

83. See Wells & Seelau, *supra* note 35, at 771.

84. See Judges, *supra* note 71, at 258. In this comment, “perpetrator” and “culprit” are terms used to define the person who actually committed the crime. The term “suspect” is used to define the person police have reason to believe may have committed the crime in question. The term “foil” is used to describe an individual placed in the lineup who is known to be innocent of the crime in question.

85. See Wells & Seelau, *supra* note 35, at 771. When a distractor is chosen it is an

Eyewitnesses are more likely to select an innocent suspect when the suspect fits the initial description given by the victim and the distractors do not fit the same description.⁸⁶ This pattern occurs because the suspect stands out from the other members in the lineup,⁸⁷ thereby increasing the chance of being falsely identified.⁸⁸ When the distractors and the suspects all fit the eyewitness' initial descriptions of the culprit, there is an increased chance that a distractor rather than a potentially innocent suspect will be chosen.⁸⁹

The official review paper of the APLS warns that although this recommendation sounds simple to employ, it is actually one of the most complex.⁹⁰ Distractors should also not be chosen because they look like the suspect.⁹¹ If the distractors bear too close a resemblance to a suspect, the lineup will eventually be composed of clones, and will interfere with the eyewitness' ability to identify the actual culprit.⁹² Researchers recommend that distractors be chosen based on the eyewitness' initial descriptions of the culprit, rather than because they have an appearance similar to that of the suspect.⁹³

However, there are problems that may arise when choosing distractors who do fit the eyewitness' initial description of the culprit.⁹⁴ First, a suspect does not always match the verbal description given by the eyewitness.⁹⁵ If this occurs, it has been recommended that distractors be chosen based on consideration of both features mentioned by the eyewitness and salient features of the police suspect.⁹⁶

error, but it is harmless because the identification of a distractor does not result in charges being filed whereas the mistaken identification of an innocent suspect does result in charges being filed. See *id.*

86. See *id.*

87. See Wells et al., *supra* note 12, at 630.

Perhaps the suspect stands out because s/he is the only one who fits the verbal description that the eyewitness had given to police earlier, or because the suspect is the only one dressed in the type of clothes worn by the culprit, or because the suspect's photo was taken from a different angle than the other photos. See *id.*

88. See Wells & Seelau, *supra* note 35, at 771.

89. See *id.*

90. See Wells et al., *supra* note 12, at 630.

91. See *id.* at 632.

92. See *id.*

93. See *id.*

94. See *id.*

95. See *id.* at 632. For example, a suspect may not match the verbal description given by the eyewitness when the suspect is implicated based on some other evidence like fingerprints or possession of a crime weapon. See *id.*

96. See Wells et al., *supra* note 12, at 632-33. The APLS paper provides a useful example. Suppose a witness describes the perpetrator as "a white male, 21-25 years old, a protruding chin, dark hair, around 165 pounds, and around 5'9" tall." *Id.* at 627. The

Second, an eyewitness' description may be so specific that it becomes difficult to compose an unbiased lineup.⁹⁷ This situation may occur, for example, when the description includes a distinctive scar or tattoo.⁹⁸ When this happens, some researchers suggest that a lineup should not occur because the description is specific enough that police should not have difficulty apprehending a suspect who fits the description.⁹⁹ Others believe if a lineup is conducted, the unique feature described by the eyewitness should either be covered up or created on all other lineup members.¹⁰⁰

Third, there may be multiple eyewitnesses who describe the culprit differently.¹⁰¹ Researchers recommended that if this occurs, different lineups should be constructed for each witness because it will prevent the exposure of all eyewitnesses to the same lineup.¹⁰² If the lineup is biased, multiple eyewitnesses might choose the same suspect because he unduly stands out. If more than one eyewitness chooses the same suspect, the identification appears to have higher validity, referred to as "correlated error."¹⁰³

Fourth, there may be some feature of the culprit that the eyewitness does not describe because they believe it "goes without saying,"¹⁰⁴ for example, the presence or absence of facial hair.¹⁰⁵ A related problem occurs when a suspect has a particular feature that the eyewitness did not mention in the initial description of the culprit.¹⁰⁶

suspect shares these features except his chin is receding, not protruding, and he is 32 years old. Here, paper recommends that the fillers should be "white males, around 32 years old in appearance with slightly receding chins and dark hair, around 165 pounds, and around 5'9" tall." *Id.* at 628.

97. See Judges, *supra* note 71, at 260.

98. See *id.*

99. See Wells et al., *supra* note 12, at 634. The rationale for foregoing a lineup when an eyewitness gives a specific description of unique features is that it is impossible to find a reasonable set of distractors.

[Further], [w]ith a vague description, a lineup provides the witness with an opportunity to recognize physical characteristics that he or she had been unable to recall when providing a prelineup description of the culprit. A recognition memory task (i.e., a lineup) seems unnecessary when an eyewitness' recall is so complete that he or she describes specific idiosyncratic physical features of the culprit. Under such circumstances, . . . the police need only apprehend a suspect who fits the witness' description.

Id. at 628-29.

100. See Judges, *supra* note 71, at 260.

101. See Wells et al., *supra* note 12, at 634.

102. See *id.*

103. *Id.*

104. Judges, *supra* note 71, at 260.

105. See Wells, et al., *supra* note 12, at 633.

106. See *id.*

When either of these problems occur, researchers generally suggest that investigators take care that the lineup is not constructed in a way that causes the suspect to stand out.¹⁰⁷

According to the APLS scientific review paper, the neutrality of a lineup can be tested using "mock witnesses."¹⁰⁸ Mock witnesses are people who are not familiar with the culprit.¹⁰⁹ These people are given the eyewitness' initial verbal description of the culprit and then shown the lineup.¹¹⁰ If the suspect is chosen at a rate higher than chance expectations based on the number of lineup members, it is likely that the lineup is biased.¹¹¹

Another problem caused by a foil-biased lineup is that it artificially increases eyewitness confidence.¹¹² When an eyewitness chooses an innocent suspect who is the only lineup member who fits the eyewitness' initial description, the eyewitness' confidence is likely to be greater than if other members of the lineup also fit the description.¹¹³ The problem with artificially increasing eyewitness confidence in this way is described below.

3. *Confidence Malleability*

Studies have shown that many decision-makers in the criminal justice system rely heavily on a particular eyewitness' confidence as a gauge of the accuracy of that eyewitness' identification.¹¹⁴ However, research indicates that witness confidence is largely unrelated to identification accuracy.¹¹⁵ The reason confidence and accuracy are unrelated is because confidence is "malleable," meaning it can be inflated due to a variety of factors that occur after the identification.¹¹⁶ Therefore, an eyewitness' confidence at trial does not necessarily reflect the accuracy of the identification, but may instead reflect the influence of post-identification factors such as confirming feedback from the lineup administrator.¹¹⁷

107. *See id.* at 633-34.

108. *See id.* at 631.

109. *See id.*

110. *See id.*

111. *See* Wells et al., *supra* note 12, at 631.

112. *See id.*

113. *See id.*

114. *See* Davenport et al., *supra* note 13. Also note that level of certainty demonstrated by the witness is one of the five factors that the U.S. Supreme Court has identified as important when evaluating the likelihood of misidentification. *See* Neil v. Biggers, 409 U.S. 188, 199-200 (1972).

115. *See* Judges, *supra* note 71, at 265.

116. *See* Wells, et al., *supra* note 12, at 624.

117. *See* Wells & Seelau, *supra* note 35, at 780.

A lineup administrator can inflate an eyewitness' confidence by, for example, providing feedback that a co-witness identified the same suspect.¹¹⁸ This problem is also an example of a "system variable" because the use of police interview techniques and other factors controllable by the criminal justice system are the primary reason confidence is inflated.¹¹⁹ Studies have also demonstrated how positive feedback can contaminate the witness' recollection of his or her own experience with the identification procedure.¹²⁰ One study demonstrated how confirmatory feedback such as:

"Good, you identified the actual suspect in the case," . . . yielded responses from the eyewitnesses indicating greater certainty in the identification, a better view of the culprit, a greater ability to make out details of the face, greater attention to the event, a stronger basis for making the identification, greater willingness to testify, more trust in an identification made under these conditions, and more details provided in the description.¹²¹

Other studies have shown that witnesses who are questioned repeatedly, or briefed about the questions they can expect on cross-examination regarding the identification have increased confidence in the identification.¹²² Studies like these demonstrate how easily a remark by a lineup administrator can turn an inaccurate eyewitness into a confident witness that jurors are likely to believe.¹²³

Researchers have recommended that in order to decrease the possibility of contamination, a "double blind procedure" should be used.¹²⁴ This simply means that the person who conducts the lineup should not know which member of the lineup is the suspect.¹²⁵ A commonly held scientific belief is that "[a] person's assumptions that a phenomenon will happen leads to behaviors that tend to make the phenomenon happen."¹²⁶ If a lineup administrator does not know who the suspect is, he is less likely to unknowingly exert an influence on the eyewitness' decision.¹²⁷

Another recommendation is that a statement of the eyewitness'

118. See Wells et al., *supra* note 12, at 635.

119. See Judges, *supra* note 71, at 266.

120. See *id.* at 266-67.

121. *Id.*, citing Gary Wells & Amy Bradfield, "Good, You Identified the Suspect": Feedback to Eyewitnesses Distorts Their Reports of the Witnessing Experience, 83 J. APPLIED PSYCHOL. 360, 366 (1998).

122. See Wells et al., *supra* note 12, at page 624-25.

123. See Judges, *supra* note 71, at 269.

124. See Wells et al., *supra* note 12, at 627.

125. See *id.*

126. *Id.* at 627.

127. See *id.* at 629.

level of confidence in his or her identification should be taken before he or she is given any feedback about the identification.¹²⁸ Determining the eyewitness' level of confidence immediately after the identification will not allow time for post-identification factors to influence that level.¹²⁹ This procedure is effective because if the eyewitness expresses a higher level of confidence at trial than he or she did at the identification, the fact-finder should be aware that any increase in confidence might be the result of factors other than accuracy.¹³⁰

4. *Blank Lineups*

Researchers have tried to identify individuals who are prone to using relative judgment.¹³¹ The above has been accomplished through the use of a dual lineup, in which a witness is presented with a blank lineup—a lineup in which all individuals are known to be innocent of the offense in question—before being presented with the actual lineup.¹³² The blank lineup operates as a lure to see if the eyewitness will resist falsely identifying someone.¹³³ Studies have shown that eyewitnesses who identify a person in a blank lineup are more likely also to make a false identification in a subsequent actual lineup.¹³⁴ Perhaps the strongest support for the use of dual lineups is research showing that dual lineups only minimally reduce the frequency of accurate identifications.¹³⁵ The only effect of dual lineup procedures appears to be reducing the rate of false identifications.¹³⁶

5. *Sequential versus Simultaneous Lineup Procedures*

A sequential lineup procedure requires the eyewitness to view the lineup members one at a time, making a determination whether or not each person is the perpetrator before moving on to the remaining lineup members.¹³⁷ This type of lineup is different from the more traditional “simultaneous lineup,” which allows an eyewitness to view all lineup members at the same time.¹³⁸ A simultaneous lineup encourages the

128. See Wells & Seelau, *supra* note 35, at 780.

129. See *id.*

130. See *id.*

131. See *id.* at 770.

132. See *id.*

133. See *id.*

134. See Wells & Seelau, *supra* note 35, at 770.

135. See *id.*

136. See *id.*

137. See *id.* at 772.

138. See *id.*

use of relative judgment because witnesses are given the opportunity to compare the lineup members to one another, choosing the one who looks most like the perpetrator.¹³⁹

Conversely, a sequential lineup forces the eyewitness to use absolute judgment,¹⁴⁰ deciding based on his or her memory whether each individual is the perpetrator rather than based on relative judgment.¹⁴¹ When a sequential lineup is used, the eyewitness has not yet seen the remaining lineup members, thus, he or she is not in the position to make a relative judgment.¹⁴²

C. *U.S. Supreme Court Treatment*

Researchers have long recommended the adoption of guidelines that incorporate their findings regarding eyewitness evidence procedures.¹⁴³ As illustrated by the U.S. Supreme Court's treatment of eyewitness identification cases, the Court has not been oblivious to the problems with eyewitness identification procedures.¹⁴⁴ However, to date, the Court has not provided a standard set of legal rules that every law enforcement investigator must follow when conducting lineups.¹⁴⁵

On June 12, 1967, the U.S. Supreme Court announced decisions in three cases involving problems with eyewitness identification procedures.¹⁴⁶ These three cases have become known as the "*Wade* trilogy."¹⁴⁷ All three of these cases involved lineup practices that the Court recognized as problematic.¹⁴⁸

1. *The Wade Trilogy*

In *United States v. Wade*,¹⁴⁹ the Court held that denying the defendant an attorney during a lineup violates his Sixth Amendment right to counsel.¹⁵⁰ However, the Court decided that that even if

139. *See id.*

140. *See Wells & Seelau, supra* note 35, at 768-69.

141. *See id.*

142. *See Wells et al., supra* note 12, at 617.

143. *See id.* at 609-12.

144. *See id.* at 609.

145. *See id.*

146. *U.S. v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), and *Stovall v. Denno*, 388 U.S. 293 (1967).

147. *See* David E. Paseltiner, *Twenty Years of Diminishing Protection: A Proposal to Return to the Wade Trilogy's Standards*, 15 HOFSTRA L. REV. 583 (1987).

148. *See Wells & Seelau, supra* note 35, at 782.

149. 388 U.S. 218 (1967). In *Wade*, the defendant was convicted of robbery after being identified in a lineup at which he was denied counsel. *See id.*

150. *See id.* at 241.

In *Kirby v. Illinois*, only 5 years after *Wade*, the United States Supreme Court held that, unless 'adversary judicial proceedings' have been initiated against

counsel is not present, a subsequent in-court identification is permitted if the government can establish by "clear and convincing evidence that the in-court identification [is] based upon observations of the suspect other than the lineup identification."¹⁵¹ This became known as the "independent origin" or "independent source" rule:¹⁵² that an in-court identification following improper pretrial lineup or show-up will be permitted only if the prosecution can show that such in-court identification arises from an independent source.¹⁵³

The second case in the *Wade* trilogy, *Gilbert v. California*,¹⁵⁴ also involved the right to counsel.¹⁵⁵ *Gilbert* expanded on the *Wade* decision by adding a second prong to the rule announced in *Wade*.¹⁵⁶ The second prong provides that testimony based on a lineup during which counsel is not present is subject to a "per se exclusionary rule" and will not be permitted.¹⁵⁷ The Court concluded that the exclusionary rule is the only effective way to "assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup."¹⁵⁸

*Stovall v. Denno*¹⁵⁹ is the final case in the *Wade* trilogy. In

him, an arrested suspect is not entitled to have his lawyer attend a lineup.

Shortly afterward, in *U.S. v. Ash*, the Court held that there is no sixth amendment right to counsel at a photographic display, even after indictment.

Neil C. McCabe, *The Right to a Lawyer at a Lineup: Support from State Courts and Experimental Psychology*, 22 IND. L. REV. 905, 905 (1989).

151. *Wade*, 388 U.S. at 240. The factors the court considered in determining if there was an independent source are:

[T]he prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification. It is also relevant to consider those facts which, despite the absence of counsel, are disclosed concerning the conduct of the lineup.

Id. at 241.

152. *Gilbert v. California*, 388 U.S. 263, 272 (1967).

153. *See Wade*, 388 U.S. at 240.

154. 388 U.S. 263 (1967). In *Gilbert*, the defendant was identified in a lineup that was conducted in an auditorium and was viewed simultaneously by approximately one hundred victims of robberies charged to the defendant. The lineup was conducted on a stage, behind bright lights, preventing those in the lineup from seeing the audience. The defendant's counsel not present. *See id.* at 269-70.

155. *See id.*

156. 388 U.S. 263 (1967).

157. *Gilbert*, 388 U.S. at 273.

158. *Id.* at 273.

159. 388 U.S. 293 (1967). In *Stovall*, the defendant was charged with murder. He was exhibited on the day after the crime, alone and handcuffed, before the only living eyewitness of the crime. The show-up was conducted in a hospital room because the eyewitness had been stabbed eleven times and was in the hospital. The defendant's counsel was not present.

Stovall, the Court held “that suggestive procedures could violate due process even when the right to counsel does not apply.”¹⁶⁰ There, the defendant challenged a suggestive lineup based on his Fifth and Fourteenth Amendment due process rights.¹⁶¹ The Court held that a defendant is entitled to relief if the lineup was “so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law”¹⁶² based on the “totality of the circumstances.”¹⁶³

The *Wade* trilogy thus established that denying counsel to a defendant appearing in a pre-trial identification constituted a violation of that defendant’s Sixth Amendment right to counsel, and that suggestive identification procedures could be violative of due process.¹⁶⁴ However, *Simmons v. United States*¹⁶⁵ marked the beginning of the dismantling of the *Wade* trilogy and its protections.¹⁶⁶

2. *The Demise of the Wade Trilogy*

In *Simmons*,¹⁶⁷ the Court rephrased the *Stovall*¹⁶⁸ standard in a way that weakened a defendant’s right to due process in a lineup.¹⁶⁹

See id.

160. Wells & Seelau, *supra* note 35, at 783. Although the right to counsel at certain pretrial identification procedures was announced the same day in *Wade* and *Gilbert*, the Court held that the right should not apply retroactively. Therefore, in *Stovall*, the Court held that the defendant’s right to counsel was not violated. See Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259, 263-64 (1990-1991).

161. *Stovall*, 388 U.S. 293.

162. *Id.* at 302. The Court ruled that while the show-up in *Stovall* was suggestive, it was not “unnecessarily suggestive.” Wells & Seelau, *supra* note 35, at 783.

163. *Id.* The Court announced the “totality” standard without stating the factors that should be used, although, the Court looked only to factors surrounding the identification. See Paseltiner, *supra* note 147, at 588.

164. *U.S. v. Wade*, 388 U.S. 218 (1967), *Gilbert v. California*, 388 U.S. 263 (1967), *Stovall v. Denno*, 388 U.S. 293 (1967).

165. 390 U.S. 377 (1968). In *Simmons*, the defendant was charged with robbery. On the day following the robbery, FBI agents obtained several photos of the suspect from his sister. The FBI agents then took the photos to the bank employees who witnessed the robbery at their place of work. Each witness was shown the photos separately, and all of them identified the defendant. At later dates, some of these witnesses were re-interviewed by FBI agents and shown indeterminate numbers of photos, and again identified the defendant. At trial, the Government did not introduce any of the photos, but relied on in-court identifications of the defendant by the witnesses. The court upheld the robbery conviction even though the in-court witnesses had been shown photos of the defendant before trial in suggestive circumstances that might have tainted the in-court identifications. See *id.* at 382.

166. See Paseltiner, *supra* note 147, at 589.

167. 390 U.S. 377 (1968).

168. 388 U.S. 293 (1967).

169. See Benjamin E. Rosenberg, *Rethinking the Right to Due Process in Connection with Pretrial Identification Procedures: An Analysis and a Proposal*, 79 KY. L.J. 259 at 268

The *Simmons* Court held that a lineup identification would be set aside only if it was "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."¹⁷⁰

The next two pretrial identification cases decided by the Court were *Neil v. Biggers*¹⁷¹ and *Mason v. Brathwaite*.¹⁷² These two cases are known as the cases that completed the demise of the *Wade* trilogy protections.¹⁷³ *Biggers* and *Brathwaite* established that the right to due process focuses on the reliability of eyewitness identifications, not procedural fairness.¹⁷⁴

In *Neil v. Biggers*,¹⁷⁵ the Court held that due process requires the exclusion of a pretrial identification only if the identification is suggestive¹⁷⁶ and unreliable.¹⁷⁷ In other words, even if a pretrial

(1990-1991).

170. 390 U.S. at 384.

171. 409 U.S. 188 (1972). The defendant in *Biggers* was convicted of rape based on evidence that consisted primarily of a station-house showup that occurred seven months after the rape. The police suggested that they used the suggestive showup technique because they had difficulty finding others who matched the victims initial description. *See id.* at 188. The Court held there was not a "substantial likelihood of misidentification." *Id.* at 201.

172. 432 U.S. 98 (1977). The defendant in *Brathwaite* was convicted of possession and sale of heroin. Glover, an undercover police officer went to an apartment building on a tip from an informant to try to purchase narcotics from a known dealer. Glover knocked at the door of one of the apartments. The area was illuminated by natural light from a window. The door was opened twelve to eighteen inches. Glover observed a man standing behind a woman at the door. Glover requested the drugs, the man at the door put out his hand, and Glover gave him the money before the man closed the door. The man soon returned and handed Glover the heroin. When Glover returned to the police station he described the seller as "a colored man, approximately five feet eleven inches tall, dark complexion, black hair, short Afro style, and having high cheekbones, and of heavy build. He was wearing at the time blue pants and a plaid shirt." *Id.* at 101. Another officer obtained a photo of defendant from the Records office and left it on Glover's desk. Later, while alone, Glover viewed the photo, and identified the man in the photo as the person from whom he purchased drugs. At the defendant's trial, the photo was received into evidence without objection and Glover testified that even though eight months had passed he was sure the person in the photo was the defendant. *See id.* at 99-102. After applying the *Biggers* factors, the Court held that under all the circumstances of the case there was not a "very substantial likelihood of irreparable misidentification." *Id.* at 116.

173. *See* Paseltiner, *supra* note 147, at 590.

174. *See* Rosenberg, *supra* note 169, at 272.

175. 409 U.S. 188 (1972).

176. One commentator remarked:

While suggestive confrontations are "disapproved" and unnecessarily suggestive ones are "condemned," the Court held that they nevertheless may be admissible if the identification was reliable. In other words, police misconduct will be tolerated as long as it does not affect reliability. The focus thus moves away from what the police did wrong (suggestiveness) to what is left after discounting police errors (reliability). As a result, the defendants rights are further diminished, and the Gilbert sanctions which were designed to protect the defendant's interests, have been effectively reduced.

Paseltiner, *supra* note 147, at 591.

identification is suggestive, it does not violate due process if it is reliable.¹⁷⁸ The Court indicated that whether a pretrial identification is reliable depends on a "totality of the circumstances" test.¹⁷⁹ The Court identified five factors to be considered in applying that test: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation and; (5) the length of time between the crime and the confrontation.¹⁸⁰

*Mason v. Brathwaite*¹⁸¹ completed the demise of the *Wade* trilogy and provides the standard used today in federal courts.¹⁸² The *Brathwaite* Court held that "reliability is the linchpin in determining the admissibility of identification testimony."¹⁸³ The Court held that reliability is to be determined by weighing the *Biggers* factors against the "corrupting effect of the suggestive identification itself."¹⁸⁴ One commentator remarks, "as a deterrent to suggestive police practices, the federal standard is quite weak. Almost any suggestive lineup will meet reliability standards."¹⁸⁵

In his dissent, Justice Marshall said "today's decision can come as no surprise to those who have been watching the Court dismantle the protections against mistaken eyewitness testimony erected a decade ago in *United States v. Wade*, *Gilbert v. California*, and *Stovall v. Denno*."¹⁸⁶

D. *History of Recommended Guidelines*

Legal researchers have been suggesting the adoption of procedural guidelines since the 1960s.¹⁸⁷ Research psychologists began drafting and publishing recommended sets of guidelines as early as 1967.¹⁸⁸ The most comprehensive set of recommendations to date is contained

177. See *Biggers*, 409 U.S. at 198-99.

178. See *Biggers*, 409 U.S. 188.

179. *Id.* at 199.

180. *Id.* at 199-200.

181. 432 U.S. 98 (1977).

182. See *id.*

183. *Id.* at 114.

184. *Id.*

185. Paseltiner, *supra* note 147, at 605.

186. 432 U.S. 98 at 118 (Marshall, J., dissenting).

187. See Wells et al., *supra* note 12, at 610. "The earliest set of published recommendations for line-up identifications is to be found in a 1967 article in the AMERICAN CRIMINAL LAW QUARTERLY (Procedure for Line-up Identification, 1967)." *Id.*

188. See *id.*

in a 1988 book written by Gary Wells,¹⁸⁹ wherein 131 specific procedural recommendations are explained.¹⁹⁰

Despite the years of research that social scientists have devoted to the study of eyewitness identification evidence, experts within the legal system remained "skeptical."¹⁹¹ One commentator remarked, "the law's generic skepticism of social science . . . risks deteriorating into a counterproductive bias if the legal system fails to recognize the genuine strides that social science has made in recent decades."¹⁹² Despite skepticism within the legal system, social science researchers have not given up on possible reform.¹⁹³ Since his 1988 book, Wells and his colleagues have begun to advocate the adoption of a much shorter list of key recommendations.¹⁹⁴

The nation's highest law enforcement agency, the Department of Justice, has also begun to advocate change in eyewitness identification evidence procedures.¹⁹⁵ In June of 1996, the U.S. Department of Justice's National Institute of Justice (NIJ) released a report entitled *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial*.¹⁹⁶ After reviewing the report, Attorney General Janet Reno directed the NIJ to further investigate the problems with the investigations that yielded the wrongful convictions contained within the report.¹⁹⁷ The obvious place to start was with the problems caused by eyewitness testimony, which played a major role in the majority of the twenty-eight cases studied.¹⁹⁸

In May 1998, the National Institute of Justice initiated a second study to establish a set of recommendations that would improve the quality of eyewitness evidence by incorporating accepted scientific principles and practices.¹⁹⁹ The NIJ put together a Technical Working

189. Gary Wells is a psychology professor at Iowa State University and is a pioneer in the field of eyewitness identification. Wells helped New Jersey establish its new lineup guidelines. See Hansen, *supra* note 22, at 20.

190. See Wells et al., *supra* note 12, at 612.

191. Judges, *supra* note 71, at 237.

192. *Id.*

193. See discussion *infra* Part B.1-5.

194. See discussion *infra* Part B.1-5.

195. See Memo, *supra* note 19.

196. United States Department of Justice Office of Justice Programs, *Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence after Trial*, (June 1996), available at <http://www.ncjrs.org/txtfiles/dnaevid.txt> (last visited Jan. 19, 2002). The study reviewed twenty-eight cases in which individuals were wrongfully convicted. See *id.*

197. See Guide, *supra* note 15, at 3.

198. See *id.*

199. See *id.*

Group for Eyewitness Evidence (“working group”).²⁰⁰ This working group of thirty-four law enforcement, legal, and research experts from the United States and Canada combined their efforts to create a set of recommendations that they hoped would increase the reliability of eyewitness evidence and reduce the predominance of wrongful convictions.²⁰¹ This study marked the first time that the American criminal justice system took formal notice of what social science researchers have been recommending for years.²⁰²

The result of this collaborative effort was a handbook released in 1999 entitled *Eyewitness Evidence: A Guide for Law Enforcement* (“Guide”).²⁰³ Although the Guide does not create an enforceable protocol, Attorney General Reno suggested that “every jurisdiction should give careful consideration to the recommendations in [the] Guide.”²⁰⁴ New Jersey appears to have heeded Reno’s warning by adopting many of the Guide’s recommendations in their new lineup procedures.²⁰⁵

E. *New Jersey’s Guidelines*

In 2001, New Jersey became the first state to adopt eyewitness evidence guidelines statewide.²⁰⁶ New Jersey was able to make statewide change because the state Attorney General has sole control of all of the state’s law enforcement agencies.²⁰⁷ The guidelines begin with a preamble, which states that the guidelines are to be considered “best practices” to ensure that New Jersey’s identification procedures “minimize the chance of misidentification of a suspect.”²⁰⁸ The guidelines are then broken into two sections: (1) composition of photo or live lineups; and (2) conducting the identification procedure.²⁰⁹ Each section contains multiple subsections outlining the different procedures to follow when conducting a photo lineup, live lineup, sequential lineup, or simultaneous lineup.²¹⁰ This subsection will outline the salient features in those various sections.

The guidelines begin with a section on the composition of photo

200. *See id.*

201. *See id.* at 5.

202. *See* Judges, *supra* note 71, at 237.

203. *See* Guide, *supra* note 15.

204. *See* Guide, *supra* note 15 at iii.

205. *See* Guidelines, *supra* note 20.

206. *See* Guidelines, *supra* note 20.

207. *See* Hansen, *supra* note 22, at 21.

208. Guidelines, *supra* note 20, at 1.

209. *See generally* Guidelines, *supra* note 20.

210. *See id.*

or live lineups.²¹¹ The section suggests that following the procedures outlined in the guidelines will result in a lineup in which “the suspect does not unduly stand out,”²¹² and appears to be designed to address “foil bias.”²¹³

The guidelines provide: “whenever practical,” the lineup administrator should be “someone other than the primary investigator assigned to the case.”²¹⁴ When this practice is not “practical” and the primary investigator conducts the lineup, the guidelines warn, “he or she should be careful to avoid inadvertent signaling to the witness of the ‘correct’ response.”²¹⁵ Second, eyewitnesses should be given an instruction that “the perpetrator may not be among those in the photo array or live lineup, and therefore, they should not feel compelled to make an identification.”²¹⁶ Third, “when possible,” lineups should be conducted sequentially.²¹⁷ Finally, the lineup administrator should ensure that the “suspect does not unduly stand out.”²¹⁸ However, the guidelines note that “complete uniformity of features is not required.”²¹⁹

When composing a lineup, the guidelines suggest that the administrator select fillers who “fit the witnesses’ description of the perpetrator,” but when the suspect’s appearance is different than such description or when such description is inadequate, fillers should resemble the suspect.²²⁰ When there are multiple eyewitnesses, the guidelines suggest merely placing the suspect in different positions.²²¹ The guidelines also suggest that reusing fillers should be avoided when lineups are shown to the same witness or when a witness is shown a new suspect.²²² Finally, the guidelines recommend that when using a photo lineup, the administrator should view the array to “ensure the suspect does not unduly stand out.”²²³

The second section of the guidelines promulgates procedures to be followed when conducting an identification.²²⁴ This section is divided

211. *See id.*

212. *Id.*

213. *See* discussion *infra* Part B-2.

214. *Guidelines, supra* note 20, at 1.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 2.

219. *Id.*

220. *Guidelines, supra* note 20, at 2.

221. *See id.* at 3.

222. *See id.* at 2.

223. *Id.*

224. *See id.* at 3.

into subsections for simultaneous photo lineups, sequential photo lineups, simultaneous live lineups, sequential live lineups, and recording identification results.²²⁵ The following will outline the notable recommendations from these sections.

The guidelines suggest that the administrator “avoid saying anything to the witness that may influence the witness’ selection.”²²⁶ Further, if the eyewitness makes an identification, the administrator should “avoid reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness’ statement of certainty” and recording the same.²²⁷ The guidelines also remind the administrator to give the eyewitness the instructions outlined in the first section.²²⁸ However, the recommendations outline a set of additional instructions to be given to the witness when a sequential lineup is used.²²⁹ The instructions for a sequential lineup inform the witness that the photos or individuals will be viewed “one at a time” in a random order.²³⁰ Additionally, the instructions give individual departments the option of stopping the lineup procedure as soon as an identification is made, or alternatively, showing all photos, even if an identification is made before the witness has seen each individual or picture.²³¹

The New Jersey guidelines suggest that simultaneous or sequential live lineups should be documented by photo or video.²³² Further, in both types of live lineups it is recommended that the administrator “ensure that any identification actions (e.g., speaking, moving, etc.) are performed by all members of the lineup.”²³³

Finally, the guidelines recommend that the lineup administrator should record both “identification and nonidentification results in writing” including the witness’ confidence statement.²³⁴ Such results should be signed and dated by the witness.²³⁵

III. IDENTIFICATION OF THE LEGAL PROBLEM

Erroneous eyewitness identification continues to be the leading

225. *See id.* at 3-7.

226. *Guidelines*, *supra* note 20, at 3.

227. *Id.*

228. *See id.*

229. *See id.* at 4.

230. *Id.*

231. *See id.*

232. *See Guidelines*, *supra* note 20, at 5, 7.

233. *Id.* at 5, 6.

234. *Id.* at 7.

235. *See id.*

cause of wrongful conviction in the United States.²³⁶ The main issue now facing the legal community is how to most effectively transform scientific research into consistent law enforcement practice. Officials in the state of New Jersey have taken a proactive approach to the problem by adopting statewide guidelines.²³⁷ The guidelines adopted by New Jersey are certainly an improvement, but they are far from ideal.

Although it is too early to tell whether the guidelines will have any practical impact, there are some problems with a state-by-state approach that may prevent an optimal return. The primary problem with the guidelines is that they are "only recommendations, not mandates."²³⁸ In his memo, the New Jersey District Attorney asked that "all members of the law enforcement community strive to implement [the] procedures."²³⁹ Thus, although they have been recommended to every law enforcement agency in New Jersey, it is not guaranteed that all agencies will indeed adopt them. Further, it will be difficult for other states to follow New Jersey's lead because most Attorney Generals do not have the authority to implement statewide change.²⁴⁰ Therefore, a state-by-state approach is a largely ineffective solution to the nationwide problem of unreliable eyewitness identification.

IV. ANALYSIS

One reason people rely heavily on eyewitness identification evidence in criminal trials is because an eyewitness who says "that is the person who threatened me with the knife" provides direct evidence of guilt.²⁴¹ Identifications provide direct evidence by directly linking the defendant to the criminal act.²⁴² In contrast, fingerprints and other physical evidence do not provide such a direct link and, hence, only provide circumstantial evidence.²⁴³ Such circumstantial evidence only indicates that the suspect touched a particular surface at some time, "perhaps for reasons unrelated to the crime."²⁴⁴ Despite its seeming superiority as evidence, direct eyewitness evidence is often exceedingly unreliable.²⁴⁵

236. See Smith, *supra* note 14, at 153.

237. See *Guidelines*, *supra* note 20.

238. See Hansen, *supra* note 22, at 20.

239. Memo, *supra* note 19.

240. See Hansen, *supra* note 22, at 21.

241. Wells et al., *supra* note 12, at 604.

242. See *id.*

243. See *id.*

244. Wells et al., *supra* note 12, at 604.

245. See Chemay, *supra* note 48, at 721.

Problematic procedures used by police departments in conducting lineups add to the unreliability of the resulting evidence. The U.S. Supreme Court has failed to delineate a uniform set of lineup guidelines to correct these procedures, thus leaving individual states and local law enforcement agencies with the task of developing their own standards.²⁴⁶ Without mandatory guidelines, agencies are left with the discretion to include or exclude various recommendations made by researchers that would make identifications more reliable. Perhaps one reason state officials have not initiated change in lineup procedures is because many of the country's 19,000 law enforcement agencies are under local, not state control, making statewide change difficult to implement.²⁴⁷ The problems with eyewitness identification evidence are not likely to be solved without mandatory, national guidelines promulgated by the U.S. Supreme Court.

A. *Critique of Supreme Court Treatment*

The Supreme Court decided several cases dealing with eyewitness identification evidence; however, the Court repeatedly ruled narrowly on the issue of the right to counsel, instead of delineating specific guidelines for lineup procedures.²⁴⁸ Through its decisions, the Court also made it more difficult to challenge faulty eyewitness identification evidence.

In *Stovall v. Denno*, the Court held that a defendant is entitled to relief if the lineup is "so unnecessarily suggestive and conducive to irreparable mistaken identification that [the defendant is] denied due process of law"²⁴⁹ based on the "totality of the circumstances."²⁵⁰ But in *Simmons v. United States*, the Court replaced the phrase "conductive to irreparable mistaken identification" with "very substantial likelihood of irreparable misidentification" making it more difficult for defendants to challenge lineups because this new standard requires a higher level of proof.²⁵¹

In *Neil v. Biggers*, the Court held that even if a pretrial identification is suggestive, it does not violate due process if it is

246. See Wells et al., *supra* note 12, at 609.

247. See *id.*

248. See Wells et al., *supra* note 12, at 609.

249. *Id.* at 302. The Court ruled that while the show-up in *Stovall* was suggestive, it was not "unnecessarily suggestive." Wells & Seelau, *supra* note 35, at 783.

250. *Id.* The Court announced the "totality" standard without stating the factors that should be used, although, the Court looked only to factors surrounding the identification. See Paseltiner, *supra* note 147, at 588.

251. Paseltiner, *supra* note 147, at 589.

reliable.²⁵² Therefore, *Biggers* “makes it difficult for the defendant to prove suggestiveness, while at the same time making it easier for the prosecution to use a suggestive identification.”²⁵³

In *Mason v. Brathwaite*, the Court relied heavily on the idea that if the defendant has counsel at the lineup, the attorney will identify and remedy any suggestive lineup procedures.²⁵⁴ This approach assumes that defense counsel is educated in the identification of problematic lineup procedures.²⁵⁵ A comprehensive review conducted by one researcher revealed the existence of problematic gaps between what science has found on the one hand, and attorneys,’ judges,’ and jurors’ common sense assumptions about eyewitness evidence on the other hand.²⁵⁶ This “gap” between common sense and scientific knowledge may close somewhat with the adoption of “sound policies and practices.”²⁵⁷

However, even if attorneys are able to identify suggestive lineup procedures, in decisions following the *Wade* trilogy, the Court limited the right to counsel to a point where it rarely applies to lineups.²⁵⁸ Thus, the Supreme Court’s response to the problems with eyewitness identification has been significantly limited in its reach.

B. *New Jersey’s Incorporation of Scientific Recommendations*

The New Jersey guidelines incorporate many of the recommendations contained within the Guide released by the National Institute of Justice.²⁵⁹ Various researchers have compiled different lists of suggested recommendations.²⁶⁰ The six recommendations that are most commonly mentioned are: (1) the witness should be instructed that the actual perpetrator may not be in the lineup;²⁶¹ (2) the lineup should be conducted in a way that a suspect does not unduly stand out;²⁶² (3) a confidence statement should be taken from the witness following his or her identification before any feedback is provided;²⁶³ (4) the lineup administrator should be unaware of who the suspect is;²⁶⁴

252. *Neil v. Biggers*, 409 U.S. 188 (1972).

253. Paseltiner, *supra* note 147, at 592.

254. *See Wells & Seelau, supra* note 35, at 784.

255. *See id.*

256. *See id.* at 340.

257. *Id.*

258. *See id.*

259. *See Guidelines, supra* note 20.

260. *See Wells et al., supra* note 12, at 629-36.

261. *See id.* at 629-30.

262. *See id.* at 630-35.

263. *See id.* at 635-36.

264. *See id.* at 627-29.

(5) mock witnesses should be used to test the neutrality of the lineup;²⁶⁵ and (6) sequential rather than simultaneous lineups should be used.²⁶⁶

New Jersey has partially adopted many of the six main recommendations. However, in many instances, New Jersey's guidelines are unclear and may result in misapplication of research findings.

1. *Instructing the Witness that the Actual Perpetrator "May or May Not" Be in the Lineup*

The New Jersey guidelines explicitly contain the recommendation that the witness should be instructed, prior to the lineup, that "the perpetrator may not be among those in the photo array or live lineup and, therefore, they should not feel compelled to make an identification."²⁶⁷ Studies have shown that such instructions reduce the rate of incorrect identifications when the actual culprit is not in the lineup, but do not reduce accurate identifications when the culprit is present.²⁶⁸ The instruction is vital to preventing the eyewitness from assuming that the police have the actual culprit and that they only need the eyewitness' identification to proceed with charges.²⁶⁹ In reality, police need very little evidence to place a suspect in a lineup, therefore there is a high risk that a police suspect is innocent.²⁷⁰

2. *Composing the Lineup in a Way that a Suspect Does not "Unduly Stand Out"*

In the introductory paragraph to the section on composing a photo or live lineup, the New Jersey guidelines state that the purpose of the procedures in that section is to ensure that the lineup composition does not cause a suspect to "unduly stand out."²⁷¹ However, the guidelines in that section fall short of incorporating all of the social science recommendations designed to prevent "foil bias."²⁷²

First, the guidelines state that when selecting fillers for a lineup, "complete uniformity of features is not required."²⁷³ Although it may be an issue of semantics, researchers have shown that complete

265. See *id.* at 631.

266. See Wells & Seelau, *supra* note 35, at 772.

267. *Guidelines*, *supra* note 20, at 1.

268. See Wells et al., *supra* note 12, at 629.

269. See *id.*

270. See *id.* at 630.

271. *Guidelines*, *supra* note 20, at 1.

272. See discussion *supra* Part II.B.2.

273. *Guidelines*, *supra* note 20, at 2.

uniformity is not merely “not required,” but is not desired.²⁷⁴ Research has made clear that distractors should be chosen to fit the eyewitness description of the culprit, rather than to resemble the suspect.²⁷⁵ The “fit the description” criteria is used because using “resemblance” as the criteria may create “undue homogeneity and interfere with the recognition of the actual culprit.”²⁷⁶ Although the guidelines appear to be suggesting this precise distinction, more concise wording would better serve the apparent purpose.

Second, the guidelines suggest that “when there is a limited or inadequate description of the perpetrator . . . or when the description of the perpetrator differs significantly from the appearance of the suspect, fillers should resemble the suspect in significant features.”²⁷⁷ This language is also not as clear as it could be. Researchers have suggested that when the suspect does not match the initial description of the perpetrator given by the eyewitness, fillers should have a combination of features from the witness’ description of the perpetrator and from the suspect.²⁷⁸ This is accomplished by selecting fillers who match the witness’ description, except when there are specific differences between such description and the suspect’s appearance.²⁷⁹ When there is a difference between the suspect’s appearance and the witness’ description, then the suspect’s appearance should control for that feature.²⁸⁰ The APLS paper provides a useful example.²⁸¹ Suppose a witness describes the perpetrator as “a white male, 21-25 years old, a protruding chin, dark hair, around 165 pounds, and 5’9” tall.”²⁸² Suppose further that the suspect shares these features except his chin is receding, not protruding, and he is 32 years old.²⁸³ In this situation, the APLS paper recommends that the fillers should be “white males, around 32 years old in appearance with slightly receding chins, dark hair, around 165 pounds, and around 5’9” tall.”²⁸⁴

Finally, the New Jersey guidelines suggest that when conducting more than one lineup due having multiple witnesses, the administrator should “consider placing the suspect in different positions in each

274. See Judges, *supra* note 71, at 258.

275. See Wells et al., *supra* note 12, at 630-32.

276. *Id.* at 632.

277. *Id.* at 632-33.

278. See *id.*

279. See Judges, *supra* note 71, at 259.

280. See *id.*

281. See Wells et al., *supra* note 12, at 633.

282. *Id.* at 627.

283. See *id.*

284. *Id.* at 628.

lineup,” hence, using all the same people, just placing them in different places.²⁸⁵ This recommendation fails to recognize the risk of “correlated error.”²⁸⁶ Researchers have suggested that when there are multiple witnesses, separate lineups should be constructed for each witness.²⁸⁷ Specifically, each lineup should consist of the same suspects, but should include different foils. The reason for this recommendation is that if the lineup is biased in a way to make the suspect stand out, it is likely that each witness will choose the suspect.²⁸⁸ If each eyewitness chooses the same suspect, it may appear that the identification is highly accurate, when in reality the witnesses may have selected the same suspect because the lineup was biased.²⁸⁹

The APLS paper recognizes that constructing a new lineup for each eyewitness is an “expensive and labor intensive exercise.”²⁹⁰ This may be the reason New Jersey opted for the less burdensome alternative of simply moving the suspect to a new position for each lineup. However, moving the suspect will not prevent “correlated error.”

3. *Recording a Confidence Statement Prior to Giving the Witness Feedback*

The New Jersey guidelines suggest that in all photo and live lineups, the administrator should avoid “reporting to the witness any information regarding the individual he or she has selected prior to obtaining the witness’ statement of certainty.”²⁹¹ This recommendation seems to adequately meet the researchers’ recommendations. Taking a confidence statement before the administrator gives the eyewitness any feedback serves the important purpose of ensuring that the eyewitness’ confidence is not inflated by post-identification information.²⁹²

4. *The Lineup Administrator Should not Know the Identity of the Suspect*

The New Jersey guidelines suggest that “whenever practical,” live or photo lineups should be conducted by someone other than the primary investigator in the case.²⁹³ The guidelines continue by

285. *Guidelines*, *supra* note 20, at 2.

286. *See Wells, et al.*, *supra* note 12, at 634.

287. *See id.*

288. *See id.*

289. *See id.*

290. *Id.*

291. *Guidelines*, *supra* note 20, at 3.

292. *See Wells & Seelau*, *supra* note 35, at 780.

293. *Guidelines*, *supra* note 20, at 1.

suggesting that if the primary investigator does conduct the lineup, he or she should be careful not to inadvertently alert the eyewitness to the "correct" response.²⁹⁴ The problem with this recommendation is its optional nature. If the primary investigator on a case does not want to go to the trouble of finding another officer to conduct a lineup, he or she can simply say it was not practical. In essence, it is likely that this procedure will not be followed.

Further, when the primary investigator does conduct the lineup, the guidelines suggest that he or she should simply be careful not to make inadvertent signals.²⁹⁵ It is true that preventing inadvertent signals is critical, but simply advising prevention is not practical. A lineup administrator is likely to influence an eyewitness even though such influence is not conscious or deliberate.²⁹⁶ The APLS paper reports that it is well established that "people have natural propensities to test a hypothesis in ways that tend to bias the evidence toward confirming the hypothesis."²⁹⁷ Studies have demonstrated that using some of the simplest body language can cause an individual to believe you are signaling them to make a certain choice.²⁹⁸ Moreover, the interaction between the lineup administrator and the eyewitness is extremely interpersonal.²⁹⁹ When the eyewitness and the administrator assume close physical distance, it is easy to maintain eye contact, make inadvertent facial expressions, or even possibly conduct verbal exchange.³⁰⁰ All of these dangers, coupled with the eyewitness' desire to do his part in the investigation, suggest that having the primary investigator conduct the lineup may have dangerous consequences.

5. *Mock Witnesses Should be Used to Test the Neutrality of the Lineup*

The New Jersey procedures suggest that when compiling a photo lineup, the administrator should "view the array, once completed, to ensure that the suspect does not unduly stand out."³⁰¹ An equivalent recommendation is not made for live lineups.³⁰² However, this is probably not the most effective way to test whether a lineup is biased. Researchers have suggested testing the neutrality of a lineup by using a

294. *Id.*

295. *See id.*

296. *See Wells et al., supra* note 12, at 627-28.

297. *Id.* at 627.

298. *See id.* at 627-28.

299. *See id.*

300. *See id.*

301. *Guidelines, supra* note 20, at 2.

302. *See discussion supra* Part II.B.2.

“mock witness” procedure in which witnesses who have never seen the culprit are given the eyewitness’ initial description of the culprit and then asked to select the person who they think is the culprit from the lineup.³⁰³ If the lineup is not biased, the mock witness should not be able to select the suspect at a level that “exceeds chance expectations based on the number of choices (number of lineup members) that could have been selected.”³⁰⁴ If it is simple for a mock witness to figure out who the suspect is under these circumstances, “a concern is raised about whether an eyewitness’ selection was a product of true recognition memory or was due merely to the same deduction process that mock witnesses apparently used.”³⁰⁵

The absence of the “mock witness” procedure from the New Jersey guidelines is probably once again due to the high cost of putting together a group of mock witnesses every time there is a lineup.

6. *Sequential Rather than Simultaneous Lineups Should be Used*

New Jersey does not require the exclusive use of sequential lineups, rather the guidelines suggest that sequential lineups should be used “when possible.”³⁰⁶ Research has shown that “any procedure that could prevent relative-judgment processes and encourage absolute judgments should reduce the likelihood of false identifications.”³⁰⁷ Research has demonstrated that the sequential lineup procedure may force eyewitnesses to rely on absolute as opposed to relative judgment, thereby reducing the likelihood of false identifications.³⁰⁸

It is unfortunate that the New Jersey guidelines leave law enforcement personnel with the option of using the simultaneous lineup procedure, when tests of the sequential lineup alternative have shown that it produces a lower rate of false identification “with little or no decrease in rates of accurate identification.”³⁰⁹

Review of New Jersey’s guidelines, in light of currently available research outlined in Part II of this comment, indicates that these guidelines have not flawlessly incorporated the current scientific research. This will likely continue to be a problem if other states or local agencies follow New Jersey’s lead and adopt similar guidelines. The result will be over 100 sets of very different guidelines, each with

303. See Wells et al., *supra* note 12, at 631.

304. *Id.* at 627.

305. Wells et al., *supra* note 12, 627.

306. *Guidelines*, *supra* note 20, at 1.

307. Wells & Seclau, *supra* note 35, at 772.

308. See *id.*

309. *Id.*

their own problems, which will take time to identify and more time to change. To solve the problem most efficiently, a uniform set of national guidelines is needed.

V. PROPOSAL

The problems with a state-by-state approach point to a broader solution—the adoption of mandatory, uniform, nationwide standards. Such a broad set of standards would be most effectively implemented through a U.S. Supreme Court decision. Although this may seem like a proposal that is unlikely to take effect, it is not unprecedented. In the 1960s, the Court was seeking means to handle an analogous situation—the regulation of the problematic police practices used to obtain incriminating statements from criminal suspects. To handle that problem, the U.S. Supreme Court announced a list of safeguards to be followed in the now famous decision, *Miranda v. Arizona*.³¹⁰

The Supreme Court should adopt a short list of guidelines similar to those adopted by New Jersey, with a few minor changes. First, the witness should be instructed prior to the lineup that the perpetrator may or may not be present, and that they should not feel pressured to make an identification.³¹¹ Second, the composition of the line-up should not cause a suspect to unduly stand out, meaning the features of the suspect and the foils should not be completely uniform or completely distinct.³¹² Third, foils in the lineup should be chosen to fit the eyewitness's initial description of the culprit, rather than to resemble the suspect.³¹³ When the eyewitness' initial description of the culprit does not match the appearance of the police suspect, foils should match the witness' description of the culprit.³¹⁴ However, when there are specific differences between the witness' description and the suspect's appearance, the suspect's appearance should control for that feature.³¹⁵ Next, when there is more than one witness, a different lineup should be created for each witness, with only the suspect remaining the same.³¹⁶ The administrator should not report any information to the witness regarding the individual he or she has selected prior to obtaining a statement of the witness' confidence in his or her identification.³¹⁷ In

310. 384 U.S. 436 (1966).

311. See discussion *supra* Part II.B.1.

312. See discussion *supra* Part II.B.2.

313. See discussion *supra* Part II.B.2.

314. See discussion *supra* Part II.B.2.

315. See discussion *supra* Part II.B.2.

316. See discussion *supra* Part II.B.2.

317. See discussion *supra* Part II.B.3.

addition, lineups should always be conducted by someone unconnected to the case, who does not know the identity of the suspect.³¹⁸ Mock witnesses should be used to test the neutrality of each lineup³¹⁹ and blank lineups should always be used.³²⁰ Sequential lineups should also always be used³²¹ and lineups should always be videotaped.³²²

Adopting *Miranda*-like rules of procedure for composing and conducting lineups, similar to those above, would result in a set of guidelines that are uniform and compulsory. However, the guidelines should not stifle other efforts to come to a workable solution. In *Miranda*,³²³ the Court warned, "our decision in no way creates a constitutional straightjacket which will handicap sound efforts at reform, nor is it intended to have this effect."³²⁴ The Court continued by stating that until procedures are developed and proven effective, the procedures articulated by the Court "must be observed."³²⁵ A similar caveat should be included if the Supreme Court adopts lineup guidelines. Allowing states to continue developing their own solutions to the problem would not stifle the great strides made by states like New Jersey. However, there would not be the problem of various states choosing to incorporate some guidelines and not others due to politics, disagreement, or other pressures. The Supreme Court should adopt a nationwide set of rules with the intention that they are a floor, not a ceiling.

Uniform nationwide guidelines would likely have an impact on the amount of erroneous eyewitness evidence because the guidelines would help attorneys identify and object to faulty identification procedures. Although suspects currently have the right to have an attorney present at lineups under certain limited circumstances,³²⁶ research has shown that this is not necessarily an effective safeguard.³²⁷ The reason the presence of counsel may not be effective is because an attorney must understand the biases that exist in lineups before he or she is able to identify the problem and persuasively argue a motion to suppress.³²⁸

318. See discussion *supra* Part II.B.3.

319. See discussion *supra* Part II.B.2.

320. See discussion *supra* Part II.B.4.

321. See discussion *supra* Part II.B.4.

322. See discussion *supra* Part II.E.

323. *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)

324. *Id.*

325. *Id.*

326. See *United States v. Wade*, 388 U.S. 218 (1967).

327. See generally, *Davenport et al.*, *supra* note 13.

328. See *id.*

However, attorneys are not the only people who should understand the problems with eyewitness evidence. With over 77,000 people becoming defendants based on eyewitness identification each year,³²⁹ there are also well over this number of eyewitnesses making identifications each year. When making identifications eyewitnesses probably do not fully understand the different variables that are influencing their decisions. If people understood the problems with eyewitness identification evidence, they would be more conscious of the process and in turn would become better eyewitnesses, jurors, judges, and attorneys.

A critical look at the problems with eyewitness identification evidence should be included in the curriculum of certain high school and college classes. For example, a class on the human mind as it relates to erroneous eyewitness identification would be simple to incorporate into the curriculum of an already required college psychology or sociology course. The 2000 census reports that "the high school completion level of young adults ages 25-29 was 88%, while college completion level was 29%."³³⁰ These statistics demonstrate that instituting this curriculum at the college level would miss a significant portion of society. Therefore, material on eyewitness identification should also be instituted at the high school level. It seems logical to include such material in a course in civics. Students in high school civics courses should understand not only the structure and operation of governmental agencies but should learn how to take a critical look at the system and its problems. These students will become the eyewitnesses, judges, jurors, and attorneys that have the ability to make substantive change.

If attorneys in particular are aware of the causes of mistaken eyewitness evidence, perhaps they will more frequently challenge lineup procedures as a violation of due process. Eventually, the Supreme Court may take notice and promulgate the guidelines that are so desperately needed to minimize the prevalence of wrongful convictions that are the result of mistaken eyewitness identifications.

VI. CONCLUSION

Errors in eyewitness identification are the leading cause of

329. See Wells et al., *supra* note 12, at 609.

330. Eric Newburger & Andrea E. Curry, *Educational Attainment in the United States (Update)* (March 2000) available at <http://www.census.gov/population/socdemo/education/p20-536/p20-536.pdf> (last visited Jan. 19, 2002).

wrongful convictions in the United States.³³¹ Research has revealed many reasons why eyewitness evidence is often unreliable.³³² Most of the factors contributing to the unreliability of such evidence are controllable by the criminal justice system.³³³ The key to fixing this problem is finding the best way to put social science research into law enforcement practice.³³⁴

A state-by-state approach to adopting guidelines is problematic primarily because most police departments are under local control, not statewide control.³³⁵ If each state or locality adopts its own, slightly different guidelines, there will be hundreds of different guidelines, each plagued with their own problems.³³⁶ A more efficient way to put social science findings into law enforcement practice would be for the U.S. Supreme Court to adopt nationwide, mandatory standards, similar to those promulgated in *Miranda v. Arizona*.³³⁷

Mandatory national guidelines modeled on the recommendations of social science researchers, coupled with education, will help attorneys identify and challenge biased lineups and will help make eyewitness evidence more reliable.³³⁸ More importantly, these recommendations are likely to reduce the rate of wrongful conviction in this country.

331. See Smith, *supra* note 14, at 153.

332. See discussion *supra* Part II.

333. See Wells & Seelau, *supra* note 35, at 765-66.

334. See discussion *supra* Part V.

335. See Hansen, *supra* note 22, at 21.

336. See discussion *supra* Part V.

337. 384 U.S. 436 (1966).

338. See discussion *supra* Part V.
